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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. _____

STATE OF OREGON,

Petitioner,

v.

GARY LEE FONDREN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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In the Supreme Court of the United States

October Term, 1978

No. _____

STATE OF OREGON,

Petitioner,

v.

GARY LEE FONDREN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner, State of Oregon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon entered in this proceeding on February 27, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing the order suppressing evidence entered by the Circuit Court of the State of Oregon for Deschutes County and remanding for trial, Appendix B hereto, is reported at 30 Or App 1045, 568 P2d 721 (1977). The opinion of the Supreme Court of the State of Oregon reversing the decision of the court of appeals, Appendix A hereto, is reported at 285 Or 361, 591 P2d 1374 (1979).

JURISDICTION

The decision of the Supreme Court of the State of Oregon, Appendix A hereto, was filed on February 27, 1979, and this petition for a writ of certiorari was filed within 90 days of that date, pursuant to Rule 22(1). This Court's jurisdiction is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

1. Does the Fourth Amendment, as applied to the States by the Fourteenth Amendment, prohibit, in the absence of further "exigent circumstances," the warrantless seizure of an automobile from an employee parking lot by a police officer who has probable cause to believe that contraband drugs are contained therein and who proposes to obtain a search warrant to search for them, when the operator of the automobile has been informed of the officer's intentions and is not in custody?

2. Is the warrantless seizure of an automobile under the circumstances described in question (1) rendered Constitutionally unreasonable by the officer's failure to obtain a search warrant when he first acquired probable cause to believe that the automobile contained contraband drugs?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

United States Constitution, Amendment XIV, § 1:

> ". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

A. General Background

Fondren was indicted by the Grand Jury for Deschutes County, Oregon, upon two counts of Criminal Activity in Drugs (possession of marijuana, ORS 167.207, and possession of peyote, ORS 167.207). Prior to trial, he filed a "Motion to Suppress" evidence (Appendix E, hereto) seized from his car, including marijuana and peyote. Following hearing, the trial court granted the motion. (See Appendix C, hereto). The state appealed to the Oregon Court of Appeals, which reversed (see Appendix B hereto). The Oregon Supreme Court granted review and reversed the decision of the Court of Appeals, affirming the decision of the trial court.

B. Facts Material to the Questions Presented

During the early evening hours of July 22, 1976, between 6:30 p.m. and 7:30 p.m., Bend, Oregon city police officer Meier received a telephone call at home from a confidential reliable informant. (Tr. 2-3, 12). Meier was told that the informant had observed

within the past 24 hours a quantity of marijuana in the trunk of an automobile driven or owned by Gary Fondren, the defendant herein. (Tr. 2-3). After changing clothes, Meier drove to the Brooks-Willamette particle board manufacturing plant, the location given by informant, and located the described car in the plain sight in a parking area that appeared to be a private lot for the employees at Brooks-Willamette. (Tr. 4-5, 13). Thereafter, Meier went to the police station where he ran a registration check on the car, checked for arrest records and background information on Gary Fondren, talked by telephone with a deputy district attorney, made a second trip to check on the car with another police officer, discussed the case with the police department's shift commander and made arrangements with the sheriff's department for assistance because the car was located outside of the city limits. (Tr. 5-6, 14, 15). Meier considered writing or preparing an affidavit for search warrant but because it was then 10 to 10:30 p.m. in the evening and he had learned that the work shift at Brooks-Willamette ended at midnight, he stopped work on the application for search warrant and returned to the plant with the sheriff's deputy. (Tr. 6). At the plant Meier contacted defendant, identified himself, asked him to step outside, told him that he had information that marijuana was hidden in the trunk of his car,

advised him of his constitutional rights and asked for consent to search the car which Fondren declined to give. (Tr. 7). Meier then told Fondren that he intended to seize and hold the car until he could make application for a search warrant — Fondren rejoined that no one would touch his car and that he wanted to consult his attorney. (Tr. 7). Fondren went back inside and Meier summoned a tow truck. When preparations for removal of the car were completed, Meier went back into the plant to look for Fondren and found that he had left. The car was then towed to the police garage at the Bend Police Department. (Tr. 7-8). The car was searched the following day under a search warrant. (Tr. 8). (The validity of the search warrant has not been an issue in proceedings below).

Following hearing on defendant's motion to suppress evidence, the trial court filed its "Memorandum Opinion" (Appendix D hereto) allowing the motion.

C. Manner in Which the Federal Question Was Raised

The Federal question presented herein was originally raised by defendant Fondren by his timely "Motion to Suppress" evidence:

> "This motion is based upon the ground that the warrantless seizure of said automobile was unreasonable and hence a violation of defendant's rights under the Fourth and Fourteenth Amendments of the United States Constitution. The

informant upon which police officers relied to establish probable cause for seizing the automobile as well as for obtaining a search warrant was not reliable. Defendant did not show the contents of the trunk of said automobile to anyone on July 21, or 22, 1976. There was therefore no probable cause for seizure of the automobile. Furthermore, no exigent circumstances existed which justified its seizure." (See Appendix E hereto).

In its Memorandum Opinion, the trial court held that the Constitution required exigent circumstances prior to the lawful seizure of the car:

> "*Cardwell v. Lewis,* 417 US 583, 41 L Ed 2d 235 (1974) does not control. It involved scrapings from the exterior of a vehicle parked in a public place. Nothing from the interior of the car and no personal effects were searched or seized. The Court stated, 'This is not to say that no part of the interior of an automobile has Fourth Amendment protection . . . it is the right to privacy that is the touchstone of our inquiry', at 335.
>
> "The State contends ORS 167.247 allows a warrantless search absent the requirements of exigent circumstances. This argument was made in *State v. Pearson,* 15 Or App 1. The Court of Appeals declined to decide the issue even though apparently it was properly presented. In light of *Coolidge v. New Hampshire, supra,* this Court concludes that ORS 167.247(1) cannot be constitutionally applied without the requirements of exigent circumstances." (Appendix D hereto)

The Order of the trial court, allowing defendant's motion to suppress evidence, set forth its finding and ruling:

> "The court has since considered the evidence and written briefs which both parties have filed, and, now being fully advised, finds upon the basis of the evidence and record that exigent circumstances did not exist and concludes therefore, that the warrantless seizure of the defendant's vehicle and subsequent search of defendant's vehicle and seizure of the evidence contained therein were unreasonable and illegal." (Appendix C hereto).

On the state's appeal to the Oregon Court of Appeals, this ruling of the trial court was assigned as error in the state's brief: "The circuit court erred in granting defendant's motion to suppress evidence." (App. Br. at 5). In reversing the trial court's order suppressing evidence, the Oregon Court of Appeals stated:

> "The trial judge held that in addition to probable cause, exigent circumstances to seize or search an operable automobile must exist before such can be done without a warrant. This was error." 30 Or App 1045, 1047, 568 P2d 721 (1977) (Appendix B hereto).

In seeking review of the court of appeals decision, defendant urged the following:

> "1. The presence of exigent circumstances is required to justify the warrantless seizure of defendant's automobile.
>
> "2. Neither mobility nor operability of an automobile is by itself a sufficiently exigent circumstance to justify a warrantless seizure on probable cause." (Petition for Review, p. 2, 10).

In its opinion reversing the decision of the court of appeals, the Oregon Supreme Court concluded that exigent circumstances were required under the Fourth

Amendment as a precondition for the lawful seizure of the vehicle and that such circumstances were not present in this case.

The Federal question presented herein has demonstrably been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

A. The Oregon Supreme Court has decided an important question of Federal constitutional law in a manner in conflict with the applicable decisions of this Court.

The decision of the Oregon Supreme Court that police could not lawfully seize an automobile without a warrant because information necessary to make application for a warrant was available at least four hours before the seizure is at substantial variance with the principles of *Cardwell v. Lewis,* 417 US 583 (1974) and *Chambers v. Maroney,* 399 US 42 (1970).

In *Cardwell v. Lewis, supra,* the Court held that the warrantless seizure of an automobile from a commercial parking lot did not violate the protections of the Fourth and Fourteenth Amendments even if it were assumed that probable cause had existed prior to the circumstances deemed exigent. *Chambers v. Maroney, supra,* upheld on Constitutional grounds the proceeds of a vehicle search even though probable cause existed when the car was stopped and the car was then driven to the police station where it was thoroughly searched.

The Oregon Supreme Court opinion fails to recognize and apply the long-standing distinction of this Court between the circumstances justifying a warrantless search of home or office and those circumstances justifying warrantless seizure and search of automobiles. The opinion below has engrafted an element of foreseeability upon the Fourth Amendments' standard for the immobilization of an automobile without a warrant. Such a rule is at odds with the decisions of this Court.

B. The Oregon Supreme Court has decided an important question of Federal constitutional law in a manner contrary to that of other courts, State and Federal.

The principles of *Cardwell v. Lewis, supra,* and *Chambers v. Maroney, supra;* have been followed by several courts that have held evidence admissible which was taken from automobiles seized without warrants where police might have obtained search warrants prior to the seizures. See, for example, *United States v. Ramirez,* 513 F2d 72 cert. denied sub nom. *Ramirez v. United States,* 423 US 912 (1975) (5th Cir 1975) (federal agents could have obtained warrant to search truck but had not planned to need warrant); *United States v. Abascal,* 564 F2d 821 (9th Cir 1977) cert. denied sub nom. *Abascal v. United States,* 435 US 953 (1978) (the court noting absence of any rule requiring officers to strike the instant they have

probable cause); *Commonwealth v. Holzer,* 480 Pa 93, 389 A2d 101 (1978) (vehicle located on street nine hours after defendant's arrest, impounded and transported prior to obtaining of search warrant). The conflict between these decisions and the decision herein merits resolution by this Court.

CONCLUSION

The decision of the Oregon Supreme Court expanding the warrant requirement for the seizure of a vehicle from premises open to the public unreasonably and unnecessarily restricts police practices and operates to the confusion and confoundment of Oregon police and prosecutors. Accordingly, and for the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Oregon herein.

Respectfully submitted,

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Attorney General

WALTER L. BARRIE
Solicitor General

THOMAS H. DENNEY
Assistant Attorney General

JAMES M. BROWN
Assistant Attorney General
Counsel for Petitioner

May, 1979

APPENDICES

Appendix A

No. 32—February 27, 1979

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

STATE OF OREGON, *Respondent,*
v.
GARY LEE FONDREN, *Petitioner.*
(No. 20990, CA 7504, SC 25651)

On review from the Court of Appeals.*

Argued and submitted April 3, 1978.

J. P. Graff, of Gildea & McGavic, P. C., Eugene, arguedd the cause and filed the briefs for petitioner.

John W. Burgess, Assistant Attorney General, Salem, argued the cause for respondent. With him on the briefs were James A. Redden, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Stephen Kanter, Portland, filed a brief amicus curiae in behalf of Oregon American Civil Liberties Union.

DENECKE, C. J.

Reversed.

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*Appeal from Circuit Court, Deschutes County. Walter I. Edmonds, Jr., Judge. 30 Or App 1045, 568 P2d 721 (1977).

DENECKE, C. J.

This is another of the search and seizure of vehicle cases in which we granted review. *State v. Greene,* 30 Or App 1019, 568 P2d 716 (1977); *State v. Downes,* 31 Or App 419, 571 P2d 914 (1977); *State v. Groda,* 32 Or App 287, 573 P2d 1269 (1978).

In *State v. Greene, supra,* 285 Or ——, — P2d ——, decided this date, we discussed the general principles governing searches and seizures of automobiles.

The facts in this case are that early one evening an officer received reliable information that the defendant had marijuana in the trunk of his car which was parked at the defendant's place of employment. The officer verified the location and ownership of the car. At about 11:30 p.m. the officer went to defendant's place of employment and asked defendant if he could look in his trunk. The defendant refused and the officer had the car towed to the police garage. The next day the officer secured a search warrant and found the marijuana.

The defendant filed a motion to suppress. The trial court found there were no exigent circumstances permitting the seizure of the car without a warrant and suppressed the evidence. The Court of Appeals reversed in a per curiam opinion which appears to state that no exigent circumstances need exist to seize an operable automobile without a warrant. *State v. Fondren,* 30 Or App 1045, 568 P2d 721 (1977).

The state argues in this case and in *State v. Greene, supra,* (285 Or ——), that exigent circumstances are not necessary in this case or in *Greene* because the officer did not have to "invade an enclave of the defendant's privacy to make a seizure"; the employe parking lot was not an enclave of privacy, neither was the residential driveway in *Greene.*

Some past decisions lend plausibility to this contention; however we are of the opinion that it does not apply in the present case. The principle germinated in *Hester v. United States,* 265 US 57, 44 S Ct 445, 68 L Ed 898 (1924), in which the officers trespassed on private land and seized containers of moonshine whiskey which had been dropped by the fleeing suspects. The Court stated the containers and their contents had been abandoned and the Fourth Amendment does not apply to a seizure of abandoned property in "open fields."

Hester was cited in support of the decision in *G.M. Leasing Corp. v. United States,* 429 US 338, 97 S Ct 619, 50 L Ed2d 530 (1977), in which the officers seized automobiles in satisfaction of tax assessments. The Court held that because the seizures took place on public streets, no invasion of privacy was involved and the seizures were not unconstitutional. The Oregon Court of Appeals followed the rationale of *Hester* in *State v. Stanton,* 7 Or App 286, 490 P2d 1274 (1971),

and held the seizure of a marijuana plant in an "open field" was not subject to Fourth Amendment protection.

We conclude that the absence of Fourth Amendment protections in these circumstances is because of the nature of the object seized as well as the place of seizure. In *Hester* it was abandoned contraband; in *Stanton* it was contraband; in *G.M. Leasing* it was property that the government was entitled to seize to satisfy taxes. The government has traditionally been granted broad powers to seize property to satisfy taxes. Notes, 23 NY Law School L Rev 791 (1978); 29 Mercer L Rev 359 (1974).

An automobile on the public street is protected by the Fourth Amendment. *Chambers v. Maroney,* 399 US 42, 51, 90 S Ct 1975, 26 L Ed2d 419 (1970), so held. *Chambers* was based upon an interpretation of the Fourth Amendment commenced in *Carroll v. United States,* 267 US 132, 45 S Ct 280, 69 L Ed 543, 39 ALR 790 (1925). The doctrine of *Carroll* is that if the officers have probable cause to believe that a car contains evidence of a crime and there are exigent circumstances requiring immediate action, the car can be seized and searched without a warrant. In *Carroll* and in almost all of its offspring, the car involved was stopped by the officers on a public street or in a public place where there was no expectation of privacy.

Nevertheless, in all of those cases the applicability of the Fourth Amendment was assumed and a warrantless search and seizure was weighed by the criteria of probable cause and exigent circumstances. We are of the opinion that whether the seizure was valid in this case depends upon the same criteria.

The defendant does not contend the officers did not have probable cause. The issue is, were there exigent circumstances; that is, was the contraband likely to disappear if the officers could not seize the car without securing a warrant? *State v. Greene, supra* (285 Or ——). The trial court held there were no exigent circumstances and we concur. The Court of Appeals was in error in holding that the trial court erred in holding "that in addition to probable cause, exigent circumstances to seize or search an operable automobile must exist before such can be done without a warrant." 30 Or App at 1047.

The facts on the issue of exigency are: Between 6:30 and 7:30 p.m. the officer obtained the information that marijuana was in the trunk of a car driven or owned by defendant, the make and license number of the car, that the defendant was employed by Brooks-Willamette and that the car was now parked in a Brooks-Willamette employes' parking lot. The information and the source of the information were sufficient to provide the officers with probable cause to

believe marijuana was in the car. Within 45 minutes after receiving the information the officer found the car on the Brooks-Willamette lot. He then discussed the matter with his shift commander and verified that the car was registered to a Fondren; however, not to the defendant Gary Fondren. The officer discussed with his commander whether to seek a search warrant. At 8:45 the officer, with another officer, went back and looked at the car. The officer then did 'some checking' on defendant. At some time during the evening the officer talked to a deputy district attorney about the matter. At 10:00 or 10:30 p.m. the officer contemplated preparing an affidavit to apply for a search warrant but decided there was not enough time as the defendant would finish his shift at 12:00. The officer testified an affidavit can be prepared and a search warrant can be obtained within an hour and a half to four hours.

At 11:30 p.m. the officer went to Brooks-Willamette and had the defendant called from his job. The defendant refused to consent to a search of his car. The officer had the defendant's car towed to the police garage. The next day the officer prepared an affidavit containing the information he had from the previous evening and the court issued a searach warrant. The trunk was searched and the marijuana was seized.

As we observed in *State v. Greene, supra* (285 Or ——), decided this date: "Underlying both of these

propositions [probable cause and exigent circumstances] is the overall principle * * * that searches [and seizures] conducted without a warrent are *per se* unreasonable, subject only to a few exceptions." 285 Or at ——.

In this case, at least four hours before the defendant was due to finish his shift and go to his car, the officer had all the information he needed to establish probable cause to secure a warrant from a magistrate. He had the same information he stated in his affidavit prepared the next day. The officer testified four hours was the maximum time needed to secure a warrant. There is no intimation that anyone other than the defendant would have had access to the car before the defendant finished his shift at midnight. The officer was not concerned with someone else gaining access to the car as he did not put the car under surveillance. That the officer waited until 10:00 p.m. or thereafter to attempt to obtain a warrant and then decided there was insufficient time does not create exigent circumstances. The officer testsified that at a time which must have been around 8:00 p.m. he discussed obtaining a warrant. The officer cannot create exigent circumstances by his own inaction.

The only automobile decision by the United States Supreme Court which held exigent circumstances were not present is *Coolidge v. New Hampshire,* 403

US 443, 91 S Ct 2022, 29 L Ed2d 564 (1971). Whether that part of the decision concerning exigent circumstances was by a plurality or a majority is uncertain, but in any event the facts which we discuss in *State v. Greene, supra,* (285 Or ——), are not comparable.

We are of the opinion that exigent circumstances continue to be a valid criteria under the Fourth Amendment as most recently held in *United States v. Chadwick,* 433 US 1, 14, 97 S Ct 2476, 53 L Ed2d 538 (1977), and they are not present in this case.

Reversed.

Appendix B

Argued August 24, reversed and remanded September 19, reconsideration denied October 26, 1977, petition for review pending

STATE OF OREGON, *Appellant,*
v.
GARY LEE FONDREN, *Respondent.*
(No. 20990, CA 7504)

568 P2d 721

The state appealed from an order of the Circuit Court, Deschutes County, Walter I. Edmonds, Jr., J., which suppressed certain contraband seized from defendants automobile. The Court of Appeals held that where the police had probable cause to think that defendant's automobile contained the contraband, the warrantless seizure of the automobile from a parking lot maintained by defendant's employer was lawful even in the absence og exigent circumstances.

Reversed and remanded.

Searches and seizures—Warrantless seizure of automobile lawful

Where police had probable cause to think that defendant's automobile contained contraband, it was not necessary that exigent circumstnaces exist before the automobile could be seized or searched without a warrant and, therefore, warrantless seizure of the automobile from parking lot was lawful.

CJS, Searches and Seizures.

Appeal from Circuit Court, Deschutes County.

Walter I. Edmonds, Jr., Judge.

John W. Burgess, Assistant Attorney General, Salem, argued the cause for appellant. With him on the briefs were James A. Redden, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

J. P. Graff, Eugene, argued the cause and filed the brief for respondent.

Before Schwab, Chief Judge, and Tanzer and Richardson, Judges.

PER CURIAM.

Reversed and remanded.

PER CURIAM.

The state appeals from an order suppressing contraband—marijuana and peyote—seized from the defendant's automobile. As the trial judge found, the police had probable cause to think that defendant's automobile contained the contraband. The police, without a warrant, seized the automobile which was on the parking lot maintained by defendant's employer for employes, and had it towed to the police garage. The police thereafter obtained a search warrant.

The trial judge held that in addition to probable cause, exigent circumstances to seize or search an operable automobile must exist before such can be done without a warrant. This was error. *See State v. Greene,* 30 Or App 1019, 568 P2d 716 (1977).

Reversed and remanded.

Appendix C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR DESCHUTES COUNTY

STATE OF OREGON, Plaintiff,	)	
	)	Case No.
vs.	)	20990
GARY LEE FONDREN, Defendant.	)	ORDER

THIS MATTER was heard at 8:30 A.M. on November 4, 1976 pursuant to defendant's motion to suppress evidence. The State appeared through Deschutes County Deputy District Attorney Warren J. West. The defendant appeared personally and with his attorney, Larry O. Gildea, of the firm of Gildea & McGavic, P.C., Eugene, Oregon. The court heard evidence and arguments of counsel, and, not being fully advised, took the matter under advisement. The court has since considered the evidence and written briefs which both parties have filed, and, now being fully advised, finds upon the basis of the evidence and record that exigent circumstances did not exist and concludes, therefore, that the warrantless seizure of the defendant's vehicle and subsequent search of defendant's vehicle and seizure of the evidence contained therein were unreasonable and illegal. There-

fore, and upon the basis of the findings and conclusions set forth in the court's memorandum opinion filed on November 29, 1976,

IT IS HEREBY ORDERED that defendant's motion be and the same hereby is allowed.

IT IS FURTHER ORDERED that any and all evidence obtained from the defendant's vehicle or otherwise as a result of its seizure and subsequent impoundment shall be suppressed in this and any other criminal proceeding against the defendant.

DATED: December 7, 1976.

Walter I. Edmonds, Jr.
Circuit Judge

Appendix D

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Plaintiff, vs. GARY LEE FONDREN, Defendant.	Case No. 20990 MEMORANDUM OPINION

This matter comes before this Court upon defendant's motion to suppress contraband recovered from defendant's automobile after it was seized without a warrant from the defendant's employer's parking lot and then searched pursuant to a warrant.

In applying constitutional requirements, there is no difference between seizing and holding a vehicle before presenting the probable cause issue to a magistrate and carrying out an immediate search without a warrant. *State v. Baggett,* 75 Or Ad Sh 3533, *Chambers v. Maroney,* 399 US 42, 90 S Ct 1975, 26 L Ed 2d 419 (1970).

The State must prove that probable cause existed to believe that the search would disclose incriminatory evidence and show that exigent circumstances obviated the need for an independent judicial determina-

tion of probable cause. *State v. Selmer,* 26 Or App 555. Under the facts of this case probable cause existed based upon information from a confidential reliable informer corroborated by independent investigation by the investigating officer. *State v. Delker,* 26 Or App 497.

The officer first obtained the information between 6:30 and 7:30 p.m. on the day in question. The information was corroborated by several methods within the next two hours. He started preparing an affidavit for a search warrant around 10:00 p.m., then abandoned it and contacted the defendant at work prior to defendant's work shift terminating around midnight. Defendant refused to consent to a search and left work. No attempt was made by defendant to remove the vehicle. The officer ordered the vehicle towed from the parking lot and impounded.

"Exigent circumstances" are delineated in *State v. Keith,* 2 Or App 133. In this case, the policeman should have asked himself, "Do I have reasonable cause to believe that I must immediately search the vehicle in order to prevent the loss of evidence?"

An automobile is no more sacrosanct from warrantless search than a person. *State v. Diaz,* 3 Or App 498. A parked unoccupied car presents different exigent circumstances than a moving vehicle. *State v. Amor,* (Mont.) 520 P2d 773; *Coolidge v. New Hampshire,* 403

US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971). If the defendant had made an attempt to remove the vehicle, then exigent circumstances would exist. *People v. Chavez,* (Col.) 485 P2d 709. Otherwise, the vehicle was subject to surveillance until a warrant could be obtained. *State v. Girard,* 25 Or App 169, Rev. 276 Or 511 (exigent circumstances existed when defendant tried to escape).

Cardwell v. Lewis, 417 US 583, 41 L Ed 2d 325 (1974) does not control. It involved scrapings from the exterior of a vehicle parked in a public place. Nothing from the interior of the car and no personal effects were searched or seized. The Court stated, "This is not to say that no part of the interior of an automobile has Fourth Amendment protection . . . it is the right of privacy that is the touchstone of our inquiry", at 335.

The State contends ORS 167.247 allows a warrantless search absent the requirements of exigent circumstances. This argument was made in *State v. Pearson,* 15 Or App 1. The Court of Appeals declined to decide the issue even though apparently it was properly presented. In light of *Coolidge v. New Hampshire,* supra, this Court concludes that ORS 167.247(1) cannot be constitutionally applied without the requirements of exigent circumstances.

Finally, the State contends that the vehicle may be seized as an instrumentality of a crime. ORS

133.535(3). By incorporation, the instrumentality of a crime may only be seized upon compliance with ORS 133.525 to 133.703. *State v. McCoy,* 249 Or 160, *State v. Keith,* supra, and *State v. Walden,* 15 Or App 259, all involved seizures pursuant to an arrest. Even the justification for permitting the search of an accused incident to a lawful arrest are absent when a search is remote in time or place from the arrest. *Cardwell v. Lewis,* supra. Here no arrest or warrant ever occured prior to the seizure.

Counsel for the defendant may present an appropriate order allowing defendant's motion.

Dated this 29 day of November, 1976.

Walter I. Edmonds, Jr.
Circuit Judge

Appendix E

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR DESCHUTES COUNTY

THE STATE OF OREGON, Plaintiff, vs. GARY LEE FONDREN, Defendant.	**MOTION TO SUPPRESS**

COMES NOW the defendant by and through his attorney, Larry O. Gildea, and moves the court for an order suppressing any and all evidence seized as a result of the warrantless seizure of a 1976 Buick four-door sedan, Oregon license ECL 267, from the parking lot of the Brooks-Willamette Corporation on or about July 22, 1976, and the subsequent execution of a search warrant of said automobile while impounded at the Bend City Police Station, on or about July 23, 1976, and all evidence derivative therefrom.

This motion is based upon the ground that the warrantless seizure of said automobile was unreasonable and hence a violation of defendant's rights under the Fourth and Fourteenth Amendments of the United States Constitution. The informant upon which police

officers relied to establish probable cause for seizing the automobile as well as for obtaining a search warrant was not reliable. Defendant did not show the contents of the trunk of said automobile to anyone on July 21 or 22, 1976. There was therefore no probable cause for seizure of the automobile. Furthermore, no exigent circumstances existed which justified its seizure.

GILDEA & McGAVIC, P.C.

Larry O. Gildea

Of Attorneys for Defendant

Supreme Court, U. S.
FILED
JUL 16 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-1760

STATE OF OREGON, *Petitioner,*

v.

GARY LEE FONDREN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OREGON

RESPONDENT'S BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1978

No. 78-1760

STATE OF OREGON, *Petitioner,*

v.

GARY LEE FONDREN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OREGON

Respondent's Brief in Opposition

The respondent, Gary Lee Fondren, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Oregon Supreme Court's opinion in this case, reported at 285 Or 361, 591 P2d 1374 (1979).

Respondent accepts petitioner's statement of the opinion below and of the basis of this Court's jurisdiction.

Constitutional Provisions

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

United States Constitution, Amendment XIV, § 1:

". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law . . ."

Constitution of Oregon, Article I, Section 9:

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

Questions Presented

1. Did the Oregon Supreme Court decide this case under the Fourth Amendment of the United States Constitution, as applied to the States by the Fourteenth Amendment, or under Article I, Section 9 of the Oregon Constitution?

2. Were exigent circumstances present which justified the warrantless seizure of respondent's vehicle from an employe parking lot upon probable cause?

Statement of the Case

Respondent accepts petitioner's statement of the general background of the case and the manner in which the federal question, if there is one, was presented. The chronology of events on July 22, 1976 may be fixed more accurately, however, than appears from petitioner's statement of the facts.

Between 6:30 and 7:30 that evening, police officer Meier received information at his home in Bend, Oregon, from a confidential reliable informant that some marijuana was contained in the trunk of a vehicle driven by respondent and presently located in the employe parking lot of the Brooks-Willamette particle board manufacturing plant, where respondent was working. (Tr. 3). Within thirty to forty-five minutes, the officer observed the car on the lot. (Tr. 5, 22). He went to the police station where he verified registration details and checked for arrest records and background information on respondent. (Tr. 5). Within forty-five minutes after

receiving the tip, the officer had acquired and confirmed all the information that he in fact used to obtain a search warrant the next day. (Tr. 22).

The officer next spoke to his watch commander about possible courses of action. (Tr. 6, 17-18). He knew from previous experience that it took from one and one-half to four hours to obtain a search warrant. (Tr. 9, 24). Officer Meier believed from the information given to him that respondent was working the swing shift at the Brooks-Willamette plant. (Tr. 25). He learned from another officer that the swing shift ended at midnight. (Tr. 6). They considered applying for a warrant and the alternatives if a judge could not be found to sign one. (Tr. 18). One of the alternatives discussed was the action ultimately taken – seizing the car without a warrant if respondent refused to consent to a search and immobilizing it until a warrant could be obtained. (Tr. 17). Officer Meier also spoke to a deputy district attorney about courses of action probably during this period but possibly as early as between 6:30 and 7:30. (Tr. 14).

No attempt was made to apply for a warrant at this time. Instead, the officer returned to the parking lot and at 8:45 observed the car a second time. (Tr. 6, 18). He did not keep the vehicle under surveillance, post a guard or return to the police station to prepare an affidavit. Instead, he did some "additional checking" on the respondent. (Tr. 19).

Officer Meier returned to the police station between 10:00 and 10:30 P.M. and started to prepare an affidavit for a warrant. (Tr. 6). He decided there was not enough time to get one before respondent's shift ended, so he returned to the Brooks-Willamette plant, spoke to respondent, indicated the police had information that there was marijuana in the trunk of respondent's vehicle, and asked for consent to search the vehicle in the parking lot. (Tr. 6-7). When respondent refused, officer Meier told him the car would be seized and held until a warrant could be obtained. (Tr. 7). Respondent went inside. (Tr. 7). Sometime between 11:30 and 11:45 the car was towed to the police garage, where it was stored overnight until a search warrant was obtained the next day.

Reasons Why the Writ Should be Denied

1. It is Not Clear Whether the Oregon Supreme Court Decided this Case Under the State Constitution or the Federal Constitution.

The present case was one of four automobile search and seizure cases consolidated for review by the Oregon Supreme Court. In the leading case, *State v. Greene,* 285 Or 337, 591 P2d 1362 (1979), the court discussed general principles governing automobile searches and seizures in an effort to clarify Oregon law in this area. The court, in deciding the present case, relied upon its discussion in *Greene.*

In *Greene,* the defendant invoked Article I, Section 9 of the Oregon Constitution as well as the Fourth and Fourteenth Amendments of the United States Constitution. On two prior occasions the Oregon Supreme Court has held that in the area of vehicle search and seizure the Oregon Constitution affords no more protection that the federal Constitution. *State v. Florance,* 270 Or 169, 527 P2d 1202 (1974); *State v. Flores,* 250 Or 273, 570 P2d 965 (1977). It so held again in *Greene* and declined to depart from analyses developed in the decisions of this Court.

Justices Linde and Lent, specially concurring in the result, described the procedure adopted below as one of

> "... looking directly to the decisions of the United States Supreme Court and then 'adopting' them to deal with each particular case. As a result, we sometimes do not know what the law in Oregon is until the United States Supreme Court tells us." *State v. Greene,* supra, 285 Or at 349.

In view of this tradition, respondent in the present case did not rely upon any provision of the Oregon Constitution in challenging the warrantless seizure of his automobile. Nevertheless, to the extent to which the court below adopted federal constitutional standards governing automobile searches and seizures in *State v. Greene,* made them part of Oregon law under Article I, Section 9 of the Oregon Constitution, applied the discussion in *Greene* to the facts of the present case, and found no exigent circumstances present here, it is unclear

whether the decision below was based on the federal or the state constitution.

2. There is Only One Issue in This Case, and It is Not Sufficiently Important to Warrant This Court's Attention.

The Supreme Court of Oregon, reversing the Oregon Court of Appeals, ruled that the warrantless seizure of respondent's automobile was justified under federal, and hence state, constitutional standards only if exigent circumstances were present. It found from the record before it that such circumstances were not present. Petitioner does not challenge the constitutional premises of the court's analysis, but only its factual finding that exigent circumstances were not present.

It is clear from the opinion below that the court carefully considered the evidence before it on the issue of exigency. Officer Meier's testimony establishes that there were at least four hours within which to apply for a search warrant before respondent's vehicle was likely to be removed from the parking lot. It would take no more than four hours to obtain a warrant. Police did not think it likely the vehicle would be removed before midnight as no steps were taken to prevent its removal earlier in the evening. Shortly after acquiring all the information that was needed and that was in fact used the next day to establish probable cause, the police reviewed alternatives open to them. These included seizing and searching the car pursuant to a warrant and seizing the car without a warrant shortly before respondent's shift ended and holding it overnight until a warrant could be obtained. Further investigation was unnecessary to establish probable cause for obtaining a warrant, so there was no reasonable justification for the delay in applying for a warrant. Under such circumstances, it would appear that police inactivity was itself a primary factor contributing to any exigencies that may have existed at 11:30. As the court below stated, "The officer cannot create exigent circumstances by his own inaction." *State v. Fondren,* supra, 285 Or at 367.

The question presented on this record is not, as petitioner's second question suggests, whether police must act to obtain

a warrant immediately upon acquiring the probable cause. It is, rather, whether the state may invoke the exigent circumstances exception to the warrant requirement to justify a warrantless seizure of a parked automobile from an employe parking lot upon information that marijuana was contained in its trunk when police intended to search the vehicle, they knew there was little likelihood that it would be removed within the time needed to obtain a warrant, there was ample opportunity to submit the issue of probable cause to a magistrate, police delayed in applying for a warrant until it was probably too late to obtain one, there was no reasonable justification for the delay and the driver subsequently refused to consent to a search. The court below considered this question fully and decided it correctly upon the basis of the record before it.

3. The Allegedly Conflicting Decisions on Which Petitioner Relies Are Distinguishable on Their Facts.

Petitioner contends the decision below conflicts with two decisions of this Court and three decisions of federal and state courts. Each of the cases cited is distinguishable on its facts from the present case, however.

In *Chambers v. Maroney,* 399 US 42 (1970), a moving vehicle suspected of involvement in a robbery was stopped on the roadside at night, the occupants arrested and the car seized and taken to the police station where it was subsequently searched. Both the seizure and subsequent search were warrantless. The seizure was upheld on the grounds that exigent circumstances existed at the time of the initial stop and in those circumstances police may do one of two things: conduct an immediate roadside search or seize the vehicle and conduct a reasonably prompt warrantless search at the station. In dictum, the Court stated that a third alternative open to the police is to seize the vehicle and hold it until a warrant is obtained. Even here, however, exigent circumstances must be present to justify the seizure.

In *Chambers,* the stop occurred within an hour after police acquired probable cause. The exigent circumstances which justified the seizure were that the car was moving, it was late at night, its occupants were alerted to police interest, and the

car was pulled over in a parking lot where it was impractical and perhaps unsafe to conduct a search. None of those factors is found in the present case. Furthermore, there was no issue of police delay in *Chambers* as there is here.

In *Cardwell v. Lewis,* 417 US 583 (1974), police wished to examine the exterior surfaces of respondent's vehicle. They had probable cause to conduct such a search several hours before they arrested respondent and seized his vehicle from a commercial parking lot. Following his arrest, police overheard respondent instruct his attorneys to ask his wife to drive the car home. Shortly thereafter the car was removed from the commercial lot to a police lot, where its exterior was examined. A plurality of this Court held that exigent circumstances existed at the time of seizure – namely, the likelihood that respondent's wife would remove the car from the parking lot before a warrant could be obtained. The principle announced in *Chambers* therefore justified an examination of the vehicle's exterior in the commercial lot or its seizure and a reasonably prompt search thereafter. Furthermore, since the search was limited to an examination of the car's exterior, it did not infringe any expectation of respondent's privacy.[1]

The plurality observed that where probable cause previously exists the reasonableness of seizing a car *under exigent circumstances* is not foreclosed by failure to obtain a warrant at the first practical moment. 417 US at 595. This observation, however, was made in a case where police failure to act in no way contributed to any exigent circumstances present at the time of seizure.

In the present case, of course, police wished to search an interior portion of respondent's automobile, not its surface.

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[1] The plurality was careful to remark:

"This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion . . ."

"In the present case, nothing from the interior of the car and no personal effects which the Fourth Amendment has traditionally been deemed to protect, were searched or seized and introduced in evidence." 417 US at 591.

Such a search would infringe upon his expectation of privacy. Furthermore, the court below expressly found that no exigent circumstances existed at the time of seizure. Even though it was late at night, the police were prepared to search the car in the parking lot with respondent's consent. Finally, police knew that the vehicle would be driven away from the parking lot at a certain time. Hence, here, unlike in *Cardwell,* delay in applying for a warrant by itself contributed to conditions, if any, making it impracticable to get one.

In *United States v. Ramirez,* 513 F2d 72 (5th Cir 1975), cert. den. sub nom. *Ramirez v. United States,* 423 US 912 (1975), undercover government agents had arranged to purchase and take delivery of a quantity of marijuana from defendants at a prearranged location in four days' time. A few hours before delivery, the agent in charge decided the delivery spot was inappropriate for a nighttime operation. Other agents, acting according to his instructions, subsequently located the truck carrying the marijuana parked at a service station, arrested the occupants and conducted a warrantless search on the spot.

Defendants contended that the search was invalid because the agents, having had probable cause to search for four days, had foregone a genuine opportunity to get a warrant. The court rejected this contention, finding that no genuine opportunity was missed. The agents' original intent was to obtain evidence that defendants were distributing marijuana, not to search the truck. They changed their intent only one and one-half hours before the search, when there was no longer time to apply for a warrant. The court stated:

> "[T]here is no requirement, constitutional or otherwise, that in order to validate unforeseen possible searches law enforcement officials must obtain search warrants when the operation being conducted does not contemplate a search." 513 F2d at 75.

The present case is distinguishable from *Ramirez* in that the sole object of the police operation was to search respondent's vehicle and a genuine opportunity to obtain a warrant existed.

The present case may also be distinguished from the *United States v. Abascal,* 564 F2d (9th Cir 1977), cert. den. sub nom.

Abascal v. United States, 435 US 953 (1978). In the course of investigating another incident, narcotic agents learned from a reliable informant that defendant's automobile, then parked at his home, contained a quantity of LSD. They placed his home and automobile under surveillance. A woman who left the residence was placed under surveillance, but she eluded the police, returned to defendant's residence, attempted to flee in his automobile, and was stopped a few blocks away where the car was searched without a warrant. Citing *Cardwell v. Lewis,* the court rejected defendant's contention that once probable cause to search arose police could not evade the warrant requirement by simply awaiting the arrival of exigent circumstances. It pointed out that whether or not the informant's tip constituted probable cause, the woman's attempt to flee with defendant's car gave police abundant probable cause to search the vehicle, and a moving vehicle containing an occupant alerted to police interest is the classic case of exigent circumstances. 564 F2d at 828-29.

While no rule requires officers to strike the instant they have probable cause, as noted in *Abascal,* police delay in obtaining a warrant in no way gave rise to the exigent circumstances which justified the search there. Any delay in applying for a warrant was clearly due to the requirements of an ongoing investigation of the activities of the defendant and the occupants of his dwelling. The same was not true here.

The final case cited by petitioner is *Commonwealth v. Holzer,* 480 Pa 93, 389 A2d 101 (1978). Police seized defendant's automobile, parked on a public street, several hours after his arrest for murder. At the time of the seizure, they knew an alleged co-conspirator was still at large and defendant's family and girl friend lived in the area where the automobile was found. The court rejected defendant's challenge to the warrantless seizure on two grounds: (1) warrantless seizure of an automobile following the driver's arrest is less constitutionally offensive than it might otherwise be since the driver suffers no inconvenience from its immobilization; and (2) the possibility of removal of the car from the area by defendant's alleged co-conspirator, girl friend or members of his family constituted sufficiently exigent circumstances to justify seizure.

In the present case, respondent was not in custody, so seizure of the automobile was a more substantial intrusion upon his privacy expectations than in *Holzer.* Furthermore, police had no reason to believe that the automobile would be removed within the time required for obtaining a warrant.

Conclusion

The decision of the Supreme Court requires police to observe a warrant requirement before seizing a vehicle from a parking lot open to public view when they have probable cause to search it, the object of their operation is to search it, they know that there is no reasonable likelihood of its removal within the time required to apply for and obtain a warrant, and there is time and assurance enough to obtain one beforehand. Far from expanding the warrant requirement or conflicting with decisions of this or other federal or state courts, this decision is consistent with constitutional standards announced by this Court in *Carroll v. United States,* 267 US 132 (1925), *Chambers v. Maroney,* supra, and *Coolidge v. New Hampshire,* 403 US 443, 458-464 (1971). Therefore, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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